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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

MALAK JAMAL CLEVELAND,

Defendant and Appellant.

C079552

(Super. Ct. No. CM040941)

Defendant Malak Jamal Cleveland was convicted of cruelty to animals. (Pen. Code, § 597, subd. (a).)¹ Defendant contends the trial court erred by failing to give a unanimity instruction. We shall affirm.

I. BACKGROUND

In spring 2013, defendant showed his new pit bull puppy, Murphy, to his neighbor, Laura Reichert. Murphy loved everybody and was fat, energetic, and happy-go-lucky. Within three weeks, Reichert, who was experienced with dogs, noticed

¹ Undesignated statutory references are to the Penal Code.

Murphy had changed. He was now fearful and cowered when defendant approached. Defendant told Reichert the two other, bigger dogs who lived on the property had attacked Murphy, but this did not make sense to Reichert because Murphy would shelter with those dogs when defendant was around. In addition, the two other dogs did not seem aggressive.

On October 6, 2013, Murphy was limping and defendant took him to Dr. Dallas Wentz, a veterinarian. Defendant told Dr. Wentz he had accidentally stepped on Murphy. Dr. Wentz observed swelling, bruising, and abnormal motion in Murphy's right front elbow, indicating Murphy had a fractured right front leg. Dr. Wentz warned defendant that, when untreated, this type of injury can fail to heal or heal improperly and cause chronic arthritis and pain. Dr. Wentz recommended X-rays and "most likely" surgery, but defendant said he could not afford them and declined. As a less expensive alternative, Dr. Wentz recommended a stabilizing bandage and pain control, but defendant again declined due to financial constraints. Dr. Wentz offered a payment plan, but defendant did not pursue it. In Dr. Wentz's experience, it is "abnormal" for a pet owner to decline all treatment, especially pain control.

A few days later, defendant took Murphy to Clark Road Animal Hospital. Like Dr. Wentz, the second veterinarian recommended surgery for Murphy's broken leg. Only a simple splint was put on the leg.

In March 2014, Reichert heard an animal yelping in pain from defendant's apartment. Defendant was yelling, "bad dog, dumb dog," and Reichert heard a fist hitting skin, followed by more yelps. Reichert yelled at defendant to stop, and defendant told her he was hitting Murphy because he had defecated and urinated in the house. Reichert explained this was wrong and defendant agreed. Reichert warned she would call the police if she heard defendant hitting Murphy again.

Over the next three weeks, Reichert twice thought she heard more yelping and hitting, but she was unsure and did nothing. Then, on March 25, 2015, Reichert heard

defendant yelling and an animal yelping. Reichert feared defendant had killed Murphy and called police.

Animal Control Officer Jennifer Robbins arrived and found Murphy to be “timid” and passive, with fresh blood trickling down his left nostril. Murphy’s right rear leg was atrophied and shorter than the left, and Murphy held it up and avoided bearing weight on it. She observed that he had swelling all over his face, blood on his sternum and his body appeared tender to the touch. A subsequent examination by Dr. Mark Dunlap, a veterinarian, revealed the neck of Murphy’s right back femur was broken off entirely and his hip was dislocated, injuries typically due to blunt force trauma. Murphy’s face was so swollen his eyes appeared closed and he had scarring and fresh scrapes around his muzzle, nose, and mouth. In Dr. Dunlap’s experience, such injuries are typically due to impact and scraping. Dr. Dunlap also observed a fresh cut near Murphy’s mouth, bleeding near his sternum, and his whole body seemed tender to the touch. Murphy’s rear paw pads were also injured, as though he had been dragged by his front legs. Additionally, there were open wounds on Murphy’s right side. In Dr. Dunlap’s opinion, Murphy had sustained his injuries over a period of weeks to months, with three periods of injury.

Defendant gave Robbins multiple explanations for the injuries. Defendant said Murphy got the bloody nose when he ran his face along a fence while chasing a squirrel. Robbins did not believe the story because it was raining and Murphy’s coat was dry, indicating he had not been outside recently. Dr. Dunlap and Robbins both testified Murphy’s injuries were also inconsistent with defendant’s other explanations, including that Murphy was involved in a dog fight, stepped on, run over with a bicycle, and involved in a car accident.

Both Robbins and Dr. Dunlap testified Murphy’s injuries were consistent with being thrown against a large object and being physically abused, including being punched or kicked. At the time of trial, Murphy continued to suffer from his leg injuries.

Defendant was charged with animal cruelty. (§ 597, subd. (a).) Prior to trial, the trial court described defendant's abuse of Murphy as "sustained," when it denied defendant's motion to reduce his charge to a misdemeanor. (§ 17, subd. (b).) In addition, before trial the prosecution indicated its theory that defendant continuously abused Murphy when it moved to amend the information to a violation of section 597, subdivision (b) because it "more properly identifies the nature of the [alleged] animal abuse" given defendant's "continuous course of conduct" with respect to Murphy. The trial court did not allow the amendment, reasoning that the theory of continuing course of conduct would be available to the prosecution under section 597, subdivision (a). Upon the prosecutor's request, the trial court confirmed it would not give the unanimity jury instruction, CALCRIM No. 3500, so long as the prosecution's theory was continuous course of conduct.

The prosecution argued during both opening and closing arguments that defendant had injured Murphy on multiple occasions in a variety of ways over a period of time, indicating its theory was that defendant's continuous torture of Murphy resulted in the injuries observed on March 25, 2014. According to the prosecutor, Murphy's "significant list of wounds [and] injuries" showed defendant tortured the dog, especially since the injuries were inconsistent with defendant's explanations. In addition, Reichert repeatedly heard defendant hitting Murphy, with defendant confirming one of those incidents. Because the case was based on circumstantial evidence, the prosecutor argued the jury should not "look at those injuries and those versions of events individually to decide if, yes or no, each individual excuse [was] reasonable." He further explained, "You need to look at everything together . . . in light of all the injuries that we saw on March 25, 2014."

A jury convicted defendant of animal cruelty, a felony. (§ 597, subd. (a).) The trial court sentenced defendant to county jail for two years. (§ 1170, subd. (h).) Defendant filed a timely appeal.

II. DISCUSSION

Defendant contends the trial court erred in failing to sua sponte instruct the jury on unanimity pursuant to CALCRIM No. 3500.² We disagree and find no error.

A trial court should give a unanimity instruction even absent a request “ “ “where the circumstances of the case so dictate.” ’ ’ (*People v. Covarrubias* (2016) 1 Cal.5th 838, 877, quoting *People v. Riel* (2000) 22 Cal.4th 1153, 1199.) We review de novo defendant’s claim of instructional error. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568 (*Hernandez*).)

“In a criminal case, ‘the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act.’ [Citation.] . . . ‘In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction.’ [Citation.]” (*People v. Covarrubias, supra*, 1 Cal.5th at pp. 877-878, quoting *People v. Russo* (2001) 25 Cal.4th 1124, 1132, 1135.)

As such, “a unanimity instruction is not required where the criminal acts are so closely connected as to form a single transaction or where the offense itself consists of a

² CALCRIM No. 3500 states: “The defendant is charged with ____ <insert description of alleged offense> [in Count __] [sometime during the period of ____ to ____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed.”

continuous course of conduct. [Citations.] This is because in both cases, the multiple acts constitute one discrete criminal event.” (*People v. Sanchez* (2001) 94 Cal.App.4th 622, 631 (*Sanchez*); see *People v. Diedrich* (1982) 31 Cal.3d 263, 282; *People v. Russo, supra*, 25 Cal.4th at p. 1135.) An offense punishes a continuous course of conduct when it may be committed by “ ‘a series of acts, which if individually considered, might not amount to a crime, but the cumulative effect is criminal.’ ” (*Sanchez, supra*, at p. 632.)

For example, in *Sanchez*, the defendant contended the trial court erred by failing to provide a unanimity instruction with respect to six counts of animal cruelty charged under section 597, subdivision (b) (counts 2-5, 7 and 11). (*Sanchez, supra*, 94 Cal.App.4th at p. 625.) As we explained, animal cruelty as defined in section 597, subdivision (b) may result from a single act of abuse such as by kicking or beating an animal or from the “cumulative effect of repetitive acts of abuse.” (*Sanchez, supra*, at p. 633.) Accordingly, we concluded no unanimity instruction was required for counts two to five, which were based on the defendant’s failure to provide adequate food and water on an ongoing basis and therefore constituted a continuous course of conduct. (*Id.* at pp. 634-635.) Similarly, we concluded no unanimity instruction was required for count 11, which was based on the defendant’s failure to provide medical treatment for a puppy that was severely wounded. (*Id.* at p. 634.) Count 11 was continuous because the defendant’s failure to act was successive, compounded, and interrelated. (*Ibid.*) In contrast, the remaining count seven was based on evidence of two separate incidents years apart in which the defendant kicked his dog. (*Ibid.*) Each of these discrete criminal events was sufficient to support a conviction under section 597, subdivision (b), separately punishable under section 654, and subject to a different possible defense, so failure to give a unanimity instruction on count seven was reversible error. (*Ibid.*)

Defendant’s conviction was based on Murphy’s injuries as observed on March 25, 2014, being caused by defendant’s ongoing and continuous torture of the dog. But even if, as defendant contends, the continuous course of conduct exception does not apply and

a unanimity instruction was required, the failure to provide that instruction was harmless error.³ “The erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible.” (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119.) Here, it is not reasonably possible that some jurors would find that Murphy’s extensive injuries on March 25, 2014, were not a result of defendant maliciously torturing the dog. As Robbins and Dr. Dunlap testified, Murphy’s injuries were consistent with being physically abused, including being punched, kicked, or thrown against a large object, rather than defendant’s explanations. In addition, there was overwhelming evidence defendant hit Murphy, including Reichert’s testimony she repeatedly heard yelping and hits, with defendant even confirming one incident. Because there is no evidence on which reasonable jurors could have found appellant committed some acts but not others, any failure to give a unanimity instruction was harmless error. (*People v. Riel, supra*, 22 Cal.4th at p. 1199; *People v. Thompson* (1995) 36 Cal.App.4th 843, 853 [“[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless”].)

III. DISPOSITION

The judgment is affirmed.

³ There is a split of authority as to the standard of prejudice to apply to the failure to give a unanimity instruction. (Compare *People v. Vargas* (2001) 91 Cal.App.4th 506, 562 [applying standard of *People v. Watson* (1956) 46 Cal.2d 818, 836] with *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545 [applying standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] (*Chapman*); see also *Hernandez, supra*, 217 Cal.App.4th at pp. 576-577 [discussing the split of authority].) The majority of courts that have addressed this issue have applied the *Chapman* standard. (See *Hernandez, supra*, at p. 576; *People v. Curry* (2007) 158 Cal.App.4th 766, 783; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 186.)

/S/

RENNER, J.

We concur:

/S/

MAURO, Acting P. J.

/S/

MURRAY, J.